SUMMARY OF THE 2008 - 2009

U.S. SUPREME COURT DECISIONS

FOR TRIAL DOGS

Summaries of Opinions and Cases Granted Review by the NAAG Supreme Court Project,

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● *Oregon v. Ice, 07-901.* By a 5-4 vote, the Court held that the Sixth Amendment does not prohibit states from assigning to judges, rather than juries, the factual findings necessary to impose consecutive, rather than concurrent, sentences for multiple offenses. Respondent Thomas Ice was found guilty by a jury of six crimes resulting from two incidents involving an 11-year-old girl. Ice was sentenced under an Oregon statute that generally provides for concurrent sentences for multiple offenses, but allows the judge to impose consecutive sentences when they do not arise from the same conduct, or if they arise from the same course of conduct and the judge finds either that the offense "was an indication of the defendant's willingness to commit more than one criminal offense" or that "[t]he offense . . . caused or created a risk of causing greater or qualitatively different . . . harm to the victim." Ore. Rev. Stat. §137.123(5). Ice was convicted for two burglaries, which the trial judge found were separate crimes, allowing the judge to exercise his discretion under state law to impose the sentences consecutively. The judge made findings that for each of the multiple sexual assault offenses, Ice displayed a willingness to commit more than one offense and "caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim." The judge proceeded to impose each sexual assault conviction consecutively to the associated burglary conviction. The Oregon appellate court affirmed the trial court's judgment, but the Oregon Supreme Court reversed, holding that the rule of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), applied because imposition of consecutive sentences "increased the quantum of punishment imposed," requiring a jury to make the necessary factual findings. In an opinion by Justice Ginsburg, the Court reversed.

The Court first discussed previous applications of *Apprendi*, reasoning that it has been applied to require a jury determination, and proof beyond a reasonable doubt, of any fact that increases the penalty for a crime beyond the statutory maximum. The Court explained that *Apprendi's* rule is meant to preserve "the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense," but that it also must respect the sovereign states' individual control over their criminal justice systems. The Court concluded that both historical practice and respect for state sovereignty counsel against applying the *Apprendi* rule to consecutive sentencing decisions. The common law has historically entrusted the decision as to how sentences should be served to the judge's sole unfettered discretion. Oregon's statute therefore does not encroach upon any facts traditionally found by the jury or erode the jury's traditional role. State legislatures have traditionally established the regime by which to administer multiple sentences, and the choice of how to impose sentences has always been placed in the hands of a judge, with no role for the jury. Although state legislatures have historically tempered the harshness of sentences by providing that some sentences will be served concurrently, states have the prerogative to determine when sentences shall be served consecutively and can leave that decision for the judge to determine pursuant to statutory factors, as is done in Oregon and other states.

The Court distinguished its ruling in *Cunningham v. California,* 549 U.S. 270 (2007), in which it held that facts permitting the imposition of an elevated "upper term" sentence for a particular crime must be found by a jury. Unlike decisions regarding the imposition

of sentences for multiple crimes, such determinations of facts warranting a higher sentence for a particular crime have traditionally been within the jury's province. The Court also reasoned that extending the *Apprendi* rule to Ice's case could lead to its intrusion into many more sentencing decisions made by judges, such as determining "the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution." And intrusion "into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings." The Court also noted that such a rule could also be difficult to administer, potentially requiring bifurcated or trifurcated trials in order to avoid prejudice to the defense from predicate fact-finding during the trial phase. The Court therefore upheld the Oregon statute and reversed and remanded.

Justice Scalia filed a dissenting opinion, which Chief Justice Roberts and Justices Souter and Thomas joined. The dissent argued that this case falls squarely under the rule announced in *Apprendi* in that Oregon is allowing judges rather than juries to find the facts necessary to commit defendants to longer prison sentences. The dissent reasoned that *Apprendi* applies to any fact that is essential to the defendant's punishment, and there is no basis to distinguish facts bearing on the number of years of imprisonment for a particular offense (covered by *Apprendi*) from those bearing on how many years will be served for multiple sentences (not covered). Because the judge necessarily found that the defendant caused "separate harms" to the victim in order to impose consecutive sentences, this factual finding was "essential to" the sentences imposed and accordingly was covered by the *Apprendi* rule. The dissent criticized the Court for "put[ting] forward the same (the *very* same) arguments regarding the history of sentencing that were rejected by *Apprendi*."

● *Herring v. United States, 07-513. In* a 5-4 decision, the Court held that the fruits of a search that was admittedly unreasonable under the Fourth Amendment were nonetheless admissible under the "good-faith rule" of *United States v. Leon,* 468 U.S. 897 (1984), because "the police mistakes [we]re the result of negligence" in the maintenance of a police office's computer database. Investigator Mark Anderson of the Coffee County, Alabama, Sheriff's Department learned that petitioner Bennie Dean Herring had driven to the Department to retrieve something from his impounded truck. Anderson suspected there was an outstanding warrant for Herring's arrest, but the county clerk checked and found none. Anderson asked the clerk to check with her counterpart in neighboring Dale County. The Dale County clerk checked that county's computer database, which showed an active arrest warrant for Herring's failure to appear on a felony charge. Upon being informed of this, Anderson arrested Herring; a subsequent search of his vehicle produced methamphetamines and a gun (which, as a felon, he could not possess). Ten to fifteen minutes later, the Dale County clerk discovered that Herring's warrant had been recalled, and that the computer database had yet to reflect the change. At Herring's trial for possessing the drugs and gun, the government admitted the search violated the Fourth

Amendment, yet successfully argued that the gun was admissible under the "good-faith exception." The Eleventh Circuit affirmed. In an opinion by Chief Justice Roberts, the Court affirmed.

The Court explained that the Fourth Amendment does not dictate an exclusionary rule; instead, the judicially created rule protects the rights secured by the Amendment by deterring police misconduct. Accordingly, "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." Rather, the question of exclusion turns on police culpability and whether exclusion will deter misconduct. All told, held the Court, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Here, the exclusionary rule does not apply because the investigator's conduct was innocent and any negligent conduct was attenuated from the arrest. In contrast to previous cases where the rule has been applied, there was no intentional or flagrant misconduct that would be deterred by excluding the evidence. The attenuated conduct here was "far removed from the core concerns that led us to adopt the rule in the first place."

The Court clarified that "[t]he pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers" (internal quotation marks omitted). Quoting *Leon*, the Court stated that the question is "whether a reasonably well trained officer would have known that the search was illegal" in light of "all the circumstances." The Court further clarified that not "all recordkeeping errors by the police are immune from the exclusionary rule." If the police were "reckless in maintaining a warrant system" or knowingly made false entries, "exclusion would certainly be justified." And "[i]n a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system." Here, however, no evidence of such systemic problems was introduced. In the end, held the Court, "we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way" (internal quotation marks omitted).

In dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, argued that the exclusionary rule should have applied because it would have a deterrent effect on careless state recordkeeping, which could prevent the unnecessary arrests of innocent persons. The dissent reasoned that the exclusionary rule is often the only remedy to redress Fourth Amendment violations. Applying the rule to cases of negligence would therefore help make the government more careful in the future. By ensuring accuracy and requiring the government to keep its databases updated, the dissent reasoned, the "grave concerns to individual liberty" from mistaken arrests could be ameliorated. Justice Breyer, in a separate dissenting opinion joined by Justice Souter, stated that a clear line should be drawn that when police misconduct is involved, the exclusionary rule should apply. Compare *Arizona v. Evans*, 514 U.S. 1 (1995) (recordkeeping errors by a *court* clerk does not trigger the exclusionary rule).

● *Arizona v. Johnson, 07-1122.* The Court unanimously held that, after a car is lawfully stopped for a traffic infraction, an officer may conduct a patdown of a passenger if the officer reasonably suspects the passenger is armed and dangerous — even if the officer does not have reasonable grounds to believe the passenger is committing, or has committed, a criminal offense. The officers, members of Arizona's gang task force, stopped the vehicle after a license plate check revealed that the registration had been suspended. The officers had no reason to suspect that any of the three occupants of the vehicle was involved in criminal activity, but during the stop an officer observed that respondent Lemon Johnson was wearing clothing consistent with gang membership and had a police scanner in his pocket. The officer asked Johnson to get out of the car to gain intelligence about his gang activity. Based on her observations, she feared that Johnson might have a weapon on him, so she patted him down when he exited the car. During the patdown, the officer felt the butt of a gun near Johnson's waist. Johnson was charged with possession of a weapon by a prohibited possessor. The Arizona Court of Appeals reversed Johnson's conviction. The court ruled that, prior to the frisk, the detention had "evolved into a separate, consensual encounter" involving possible gang affiliation. Accordingly, absent reason to believe Johnson was involved in criminal activity, the officer had no right to pat him down for weapons. The Arizona Supreme Court denied review. In an opinion by Justice Ginsburg, the Court reversed.

The Court first discussed its seminal opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), which established that (1) officers may stop a person when they reasonably suspect criminal activity is afoot, and (2) when an officer reasonably suspects that a lawfully stopped person is armed and dangerous, the officer may conduct a patdown search of outer clothing for weapons. The Court reiterated that traffic stops resemble *Terry* stops and that traffic stops are "fraught with danger to police officers." The Court has therefore held that officers can order the driver and passengers out of the stopped vehicle without violating the Fourth Amendment. And in *Brendlin v. California,* 551 U.S. 255 (2007), the Court recently confirmed that for the duration of a traffic stop, a police officer "effectively seizes" all occupants of the vehicle for the duration of the stop. In this case, the Court confirmed its previous *dicta* that officers who conduct a routine traffic stop may also perform a patdown of the driver and any passengers upon reasonable suspicion they may be armed and dangerous.

The Court rejected the Arizona Court of Appeals' conclusion that, although Johnson was initially seized when the car was stopped, the interaction transformed into a consensual encounter when the officer questioned Johnson on a matter unrelated to the traffic stop (*i.e.*, his gang activity). The Court stated that the seizure that arises from a lawful roadside stop "ordinarily continues, and remains reasonable, for the duration of the stop." Such a stop normally ends only "when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave." Moreover, the Court "has made plain" that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." See *Muehler v. Mena*, 544 U.S. 93 (2005). Nothing occurred here to indicate to Johnson that

the stop had ended or that he was free to leave, and therefore the *Terry* standard applied. The Court reversed and remanded to the Arizona Court of Appeals, noting that it was not foreclosing the appellate court's consideration of whether the officer had reasonable suspicion that Johnson was armed and dangerous.

● *Vermont v. Brillon, 08-88.* By a 7-2 vote, the Court held that the Vermont Supreme Court erred when, for purposes of assessing whether a defendant's right to a speedy trial was violated, it charged to the state those periods in which appointed counsel failed to "move the case forward." Respondent Michael Brillon was charged with felony domestic assault. Due to his habitual offender status, he was subject to a potential life sentence; the court therefore him held in jail without bail. Brillon "fired" his first counsel, an assistant public defender, who withdrew on the eve of trial. A second attorney withdrew based on a conflict, and Brillon's third attorney was permitted to withdraw after he stated that Brillon had threatened him during a break in the proceedings. Brillon's fourth counsel was also permitted to withdraw when his contract with the public defender's office expired. Brillon then went two months without counsel before being assigned his fifth counsel, who also later withdrew due to changes in his contract with the public defender's office. Brillon then went another four months without counsel before his sixth counsel was appointed and the case finally went to trial. Brillon was convicted and sentenced to 12 to 20 years in prison. The trial court denied Brillon's post-trial motion to dismiss for want of a speedy trial, concluding that the delay was "in large part the result of his own actions" and that he had "failed to demonstrate prejudice as a result of [the] pre-trial delay." The Vermont Supreme Court reversed, ruling that Brillon's conviction must be vacated and the charges dismissed for violation of his Sixth Amendment speedy trial right. The court reasoned that the three-year delay was "extreme" and, in assessing the reasons for the delay, counted most of the last two-year period against the state for failure of assigned counsel to "move the case forward." In an opinion by Justice Ginsburg, the Court reversed.

The Court applied the factors from Barker v. Wingo, 407 U.S. 514 (1972), which adopted a balancing test that looks to the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The Court stated that the key issue here was the reason for the delay in Brillon's trial: whereas delay caused by the government "weighs heavily against the prosecution," "delay caused by the defense weighs against the defendant." And, held the Court, this "principle applies whether counsel is privately retained or publicly assigned. . . . Unlike a prosecutor or the court, assigned counsel ordinarily is not considered a state actor. Applying these principles here, the Court concluded that the "Vermont Supreme Court erred in "attributing to the State delays caused by 'the failure of several assigned counsel . . . to move the case forward,' . . . and in failing adequately to take into account the role of Brillon's disruptive behavior in the overall balance." In particular, "[w]hile the Vermont Defender General's office is indeed, 'part of the criminal justice system,' . . . the individual counsel here acted only on behalf of Brillon, not the State." Accordingly, "[m]ost of the delay that the Vermont Supreme Court attributed to the State must . . . be attributed to Brillon as delays caused by his counsel." Moreover, the Vermont Supreme Court erred in failing "appropriately to take into account

Brillon's role during the first year of delay." The Court recognized that the general rule it adopted is not absolute: a state may be charged "with those months if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch" or if there is "a breakdown in the public defender system." The Court found, however, that nothing in the record indicated a "breakdown in the public defender system" that could be charged to the state.

Justice Breyer, joined by Justice Stevens, dissented. The dissenters argued that the writ of certiorari should have been dismissed as improvidently granted because the case did not "squarely present" the question whether delays caused solely by a public defender can be charged against the state. The dissent concluded that the Vermont Supreme Court's opinion was, at the very least, ambiguous as to whether it was counting such periods against the state.

● *Rivera v. Illinois*, *07-9995*. The Court unanimously held that a state trial court's erroneous denial of a criminal defendant's peremptory challenge to a juror who was eventually seated does not require automatic reversal of a conviction under the Fourteenth Amendment's Due Process Clause. Michael Rivera was charged with first-degree murder in the gang-related shooting of a 16-year-old African-American. At trial, his counsel attempted to use the fourth of his seven peremptory challenges to remove from the jury pool Deloris Gomez, a hospital office supervisor at Cook Country Hospital. Because two of the three challenges already used had been exercised against women, one of whom was African-American, the judge was concerned that the challenges were being employed in discriminatory way in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and its progeny, and denied the challenge. After trial, the jury, which selected Gomez as its foreperson, convicted Rivera of first-degree murder. The Illinois Court of Appeals affirmed, but the Supreme Court of Illinois remanded to the trial court to "articulate the bases for his *Batson* ruling." The trial court explained that "prima facie evidence of sex discrimination — namely, counsel's two prior challenges to women and 'the nature of [counsel's] questions' — had prompted him to raise the *Batson* issue." On appeal, the Illinois Supreme Court held that this was error, finding insufficient evidence in the record to establish a prima facie case of discrimination of any kind. The court held, however, that the improper seating of Gomez was subject to the harmless-error doctrine. Finding no prejudice, the court affirmed the conviction. In an opinion by Justice Ginsburg, the Court affirmed.

The Court ruled that peremptory challenges are "a creature of statute" that states provide as "a benefit beyond the minimum requirements of fair [jury] selection" (quotation marks and citations omitted). As such, "[i]f a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good faith error is not a matter of federal constitutional concern. Rather it is a matter for the State to address under its own laws." Rivera attempted in vain to distinguish two key precedents, *Ross v. Oklahoma*, 487 U.S. 81 (1988), and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). In both cases, defendants had used a

peremptory challenge to remedy the trial court's erroneous denial of a challenge for cause and, in both cases, the Court found no violation either of the Sixth Amendment right to an impartial jury or the Fourteenth Amendment right to due process. Rivera argued that his situation was distinguishable because in neither *Ross* nor *Martinez-Salazar* was a challenged juror actually seated on the jury. The Court rejected this concern because Gomez could not have been removed for cause. "Thus, like the juries in *Ross* and *Martinez-Salazar*, Rivera's jury was impartial for Sixth Amendment purposes."

The Court also dismissed Rivera's concern that his due process rights were violated by seating a juror who knew that he did not want her on the jury. The Court declined to endorse "the notion that a juror is constitutionally disqualified whenever she is aware that a party has challenged her"; such a rule would invite deliberate manipulation. Nor did it matter that, unlike the defendants in *Ross* and *Martinez-Salazar*, Rivera was denied a peremptory challenge right under applicable state law. The Court reiterated that "errors of state law do not automatically become violations of due process." And "[t]o hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges." The Court declined to follow the suggestion in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), that "[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice," noting that it had disavowed this statement in dicta in *Martinez-Salazar*, and that it rested on an old line of cases predating the adoption of harmless-error review. Finally, the Court rejected as inapposite two other lines of precedent requiring automatic reversals — one involving constitutional errors relating to the qualification of the jury or the judge; the other involving federal judges or tribunals that lacked statutory authority to adjudicate. The Court held that "[n]othing in these decisions suggests that federal law renders state-court judgments void whenever there is a state-law defect in a tribunal's composition." In the end, "States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal." Here, the Illinois Supreme Court concluded they do not.

● *Arizona v. Gant, 07-542.* By a 5-4 vote, the Court held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Officers in a narcotics investigation were making arrests at a house when Rodney Gant drove up in his car, parked in the driveway, got out of his car, and shut the door. Gant then walked toward an officer who had summoned him. The officer immediately arrested Gant on an outstanding warrant for driving with a suspended license. Officers then searched the passenger compartment of Gant's car and found a gun and cocaine. Gant was prosecuted on drug charges. His motion to suppress the fruits of the vehicle search was denied, and he was later convicted. After protracted state court proceedings, the Arizona Supreme Court held that because Gant could not have accessed his car to retrieve weapons or evidence during the search, the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement,

as defined in *Chimel v. California*, 395 U.S. 752 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U.S. 454 (1981), did not justify the search in his case. In an opinion by Justice Stevens, the Court affirmed.

The Court stated that *Chimel* held that a search incident to arrest may "only" include "the arrestee's person and the area within 'his immediate control'" — a limitation which ensures that the scope of the search serves its twin purposes: officer safety and evidence preservation. In *Belton*, the Court applied *Chimel* to the automobile context, holding that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. The Court acknowledged that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." But the Court rejected that broad reading of *Belton*, finding that it "untether[s] the rule from the justifications underlying the *Chimel* exception." The Court therefore held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." The Court also adopted the rule proposed by Justice Scalia in his concurring opinion in *Thornton v. United States*, 541 U.S. 615, 632 (2004), that police may search a vehicle incident to arrest if "it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Applying its new test here, the Court concluded that the search of Gant's car was unreasonable.

The Court then rejected the state's contention that vehicle searches are reasonable regardless of the possibility of access because that bright-line rule correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The Court found that the state's position "seriously undervalues the privacy interests at stake," and noted that "*Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space." Indeed, held the Court, allowing such searches "implicates the central concern underlying the Fourth Amendment — the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." On the other side of the balance, the Court observed that the state's reading of *Belton* created uncertainty regarding how close in time and space an arrestee had to be to the automobile for the rule to apply. And a bright-line rule is not necessary to protect law enforcement safety and evidentiary interests because "[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand." Finally, the Court held that the doctrine of *stare decisis* does not require adherence to the broad reading of *Belton*. The Court stated that it has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice," and found that law enforcement's longstanding application of the rule "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."

In a concurring opinion, Justice Scalia asserted that the Court's announced standard "fails to provide the needed guidance to arresting officers and also leaves much room for manipulation." He would therefore adopt the rule that police may search vehicles incident to arrest only when there is reason to believe evidence of the offense is in the vehicle. Noting, however, that no other Justice shares his view, Justice Scalia joined the majority opinion to avoid a "4-to-1-to- 4 opinion" that would leave the governing rule uncertain. Justice Alito filed a dissenting opinion, which Chief Justice Roberts and Justice Kennedy joined, and which Justice Breyer joined in part. Justice Alito declared that the Court "effectively overrules" *Belton* and *Thornton*, and explained that *Belton* explicitly announced that vehicles may always be searched incident to the arrest of an occupant. He then asserted that the Court failed adequately to explain its departure from *stare decisis*. In particular, he pointed to law enforcement's reliance on the *Belton* rule for 28 years; that no relevant circumstances have changed since *Belton* was announced; that *Belton* was a workable bright-line rule that has not been undermined by recent cases; and that "*Belton* represented only a modest — and quite defensible — extension of *Chimel*." In particular, both decisions measured the areas within an arrestee's reach as of the time of arrest, not the time of the search. Justice Breyer filed a separate dissent expressing his agreement with the dissent that *Belton* adopted a bright-line rule; his agreement with the majority that "the rule can produce results divorced from its underlying Fourth Amendment rationale"; but agreeing with the dissent that *stare decisis* warrants retention of the bright-line rule.

● *Kansas v. Ventris, 07-1356.* By a 7-2 vote, the Court held that a criminal defendant's incriminating statement to a jailhouse informant, obtained in violation of the Sixth Amendment, is admissible for impeachment purposes. Donnie Ray Ventris was charged with felony murder, aggra-vated robbery, and aggravated burglary. He testified at his trial that, when he accompanied his girlfriend to the victim's house, he did not intend to rob the victim and did not shoot the victim. In rebuttal, the state offered the testimony of a jailhouse informant recruited by the state to share a cell with Ventris and listen for any statements Ventris might make implicating himself in the murder. According to the informant, Ventris admitted he shot the victim when the robbery had gone bad. The state conceded that placing the informant in Ventris' cell for the purpose of eliciting state-ments violated Ventris' Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964). But, argued the state, the informant's testimony was still admissible for impeachment purposes. The trial court agreed and admitted informant's testimony. The jury convicted Ventris of aggravated robbery and aggravated burglary. The Kansas Supreme Court reversed, holding that a defendant's statements made to an undercover police informant after the right to counsel has attached are not admissible for any reason, including impeachment. In an opinion by Justice Scalia, the Court reversed.

Following the rule it has applied with respect to violations of the Fourth Amendment and Fifth and Sixth Amendment prophylactic rules, the Court held that the "scope of the remedy for a violation that has already occurred" should be limited to excluding the statement from the prosecution's case in chief. To intelligently resolve the issue, the Court

addressed the predicate question of *when* the Sixth Amendment is violated by uncounseled, post-indictment interrogation. The Court found that *Massiah* was equivocal on what precisely constituted the violation: the interrogation itself or its later use at trial. The Court "conclude[d] that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation." According to the Court, "[w]e have never said . . . that officers may badger counseled defendants about charged crimes so long as they do not use information they gain." The Court held, therefore, that the "case does not involve . . . the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred." And the Court concluded that its "precedents already make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle." The interests in using the evidence for impeachment purposes is preventing perjury and assuring the integrity of the trial process. That outweighs the small added deterrence that would be obtained by preventing impeachment use of statements taken in violation of *Massiah*. As the Court observed, "[o]fficers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment."

Justice Stevens filed a dissenting opinion, which Justice Ginsburg joined. The dissent argued that the prosecution should not be allowed to exploit its pretrial constitutional violation during the trial itself. Contrary to the majority's view, a defendant's pretrial right to counsel is not merely prophylactic nor is it ancillary to, or of lesser importance than, the right to rely on counsel at trial. And the logic that compels the exclusion of the evidence during the state's case in chief extends to any attempt by the state to rely on the evidence, even for impeachment. In the dissent's view, the use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process — the fairness of which the Sixth Amendment was designed to protect.

● *Montejo v. Louisiana, 07-1529.* By a 5-4 vote, the Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which forbade police from "initiat[ing] interrogation of the criminal defendant once he has requested counsel at an arraignment or similar proceeding." Petitioner Jesse Montejo was arrested and interrogated in connection with the robbery and murder of Lewis Ferrari. Montejo waived his *Miranda* rights and answered questions for many hours, ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. Three days later, Montejo was brought before a judge and charged with first-degree murder. The judge ordered the "Office of Indigent Defender to be appointed to represent the defendant." "Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim's widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had

interrogated his client in his absence." Over defense objection, the letter of apology was admitted in evidence at Montejo's trial. The jury convicted Montejo of first-degree murder, and sentenced him to death. The Louisiana Supreme Court affirmed the conviction and sentence. In the course of that ruling, the court rejected Montejo's assertion that the police violated *Michigan v. Jackson* when they interrogated him following his arraignment, and that the letter of apology should therefore have been suppressed. The court reasoned that the *Jackson* rule applies only when a defendant "has actually requested a lawyer or otherwise asserted his Sixth Amendment right to counsel. . . . Because Montejo simply stood mute at his [arraignment] while the judge ordered appointment of counsel, he had made no such request or assertion." In an opinion by Justice Scalia, the Court upheld the Louisiana Supreme Court's ruling that *Jackson* does not apply — by overruling *Jackson*. The Court remanded to permit Montejo to assert that the letter of apology should be suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981).

The Court first agreed with Montejo that the rule adopted by the Louisiana Supreme Court "would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States." The Louisiana Supreme Court's rule "would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made" — which was the scheme in operation in *Jackson* itself. But many states appoint counsel automatically upon a finding of indigency or allow appointments to be made *sua sponte* by the court. In this latter group of states, it would be very difficult to determine whether a defendant has "asserted" his right to counsel. "How to categorize a defendant who merely asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been?" And "[h]ow does one affirmatively accept counsel appointed by court order?" In the end, the Louisiana Supreme Court rule would require adoption of two possible rules, neither of which is palatable: (1) deciding "on a case-by-case basis whether a defendant has somehow invoked his right to counsel," even though arraignments "are often rushed, and are frequently not recorded or even transcribed"; or (2) holding "as a categorical matter that defendants in these States . . . simply have no opportunity to assert their right to counsel at the hearing and are therefore out of luck." The Court found this second option unacceptable because it produces "arbitrary distinctions" that are "out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights."

Having ruled out the Louisiana Supreme Court's rule, the Court turned to Montejo's proposed rule: that "once a defendant is *represented* by counsel, police may not initiate further interrogation." The Court concluded that this "solution is untenable as a theoretical and practical matter." *Jackson* presumed that waivers of the right to counsel are invalid "by analogy to a similar prophylactic rule established to protect the Fifth Amendment based *Miranda* right to have counsel present at any custodial interrogation" (citing *Edwards,* 451 U.S. at 484-85 (once "an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by authorities until counsel has been made available," unless he initiates the contact)). *Jackson* presumed

that a defendant who requests counsel at an arraignment intends that request to encompass representation at later interrogations. And so, like the *Edwards* prophylactic rule, the *Jackson* rule was designed to protect defendants from being badgered by police into waiving their previously asserted right to counsel. With that background, the Court held that Montejo's interpretation of *Jackson* is flawed: "When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. . . . No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present." The Court observed that "Montejo's rule appears to have its theoretical roots in codes of legal ethics" such as ABA Model Rule 4.2, which forbid lawyers from communi-cating with a party represented by another lawyer in the matter. "But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers."

At the end of the day, the Court concluded that the Louisiana Supreme Court's construction of *Jackson* was theoretically sound but practically unworkable, while Montejo's construction of *Jackson* was practical but theoretically unsound. The proper solution, held the Court, was to overrule *Jackson*. Turning to the factors relevant to the *stare decisis* inquiry, the Court stated that "the opinion is only two decades old, and eliminating it would not upset expectations." Moreover, "the marginal benefits of *Jackson*" in preventing coerced confessions "are dwarfed by its substantial costs" in hindering criminal investigations. In particular, the Court pointed out that *Miranda* already prophylactically protects the right against self-incrimination; *Edwards* prophylact-ically protects the *Miranda* right; and *Minnick v. Mississippi*, 498 U.S. 146 (1990), prophylactically protects the *Edwards* right by barring subsequent interrogation after invocation of the right to counsel "whether or not the accused has consulted with his attorney." Concluded the Court, "[t]hese three layers of prophylaxis are sufficient." And although *Miranda*, *Edwards*, and *Minnick* only apply in the context of custodial interrogation, that context is where protection is most needed. (Addressing a practical objection levied by Montejo, the Court added that a defendant may not invoke his *Miranda* rights anticipatorily at an arraignment; they must be invoked during an interrogation.) Finally, the Court held that "Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*." The Court therefore vacated the Louisiana Supreme Court's judgment and remanded. Justice Alito filed a concurring opinion, which Justice Kennedy joined, that criticized the dissenting Justices for relying on *stare decisis* even though three of those Justices voted in *Arizona v. Gant*, 556 U.S. ___ (2009), to overrule *New York v. Belton*, 454 U.S. 454 (1981).

Justice Stevens filed a dissenting opinion, which Justices Souter, Ginsburg, and Breyer joined. The dissent agreed with the majority that the Louisiana Supreme Court's rule is unworkable and should be rejected. The dissent further concluded that *Jackson* did not in any way turn on the defendants having made a "request" for counsel. Under

Jackson, "[o]nce an attorney-client relationship has been established through appointment or retention of counsel," police may not initiate interrogation of the defendant outside counsel's presence. The dissent asserted that "[t]he majority's analysis flagrantly misrepresents *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect." In the dissent's view, *Jackson* was not based on "anti-badgering considerations," but rather was "firmly rooted in the unique protections afforded to the attorney-client relationship by the Sixth Amendment," *i.e.*, to ensure that counsel may aid defendants during critical confrontations with the state. And that purpose is fully served by applying *Jackson* once counsel has been appointed, and undermines the majority's reasons for overruling the decision. The dissent went on to assert that, even absent *Jackson*, Montejo's Sixth Amendment rights were violated because the police may not knowingly circumvent an accused's right to have counsel present during an interrogation and because the *Miranda* warnings are inadequate in the post-arraignment context.

● *Yeager v. United States, 08-67.* In a 6-3 ruling, the Court held that, when a jury acquits on one count and hangs on another count, the Double Jeopardy Clause bars further prosecution on the hung count if such prosecution depends on the finding of a fact the jury necessarily rejected by the acquittal. The United States charged petitioner F. Scott Yeager with conspiracy to commit wire and securities fraud, securities fraud, insider trading, and money laundering for his sale of Enron stock while he was a senior executive of an Enron subsidiary, Enron Broadband Systems (EBS). The Government's trial theory was that Yeager and others artificially inflated EBS's prospects in press releases and stock analyst meetings, and then sold Enron stock at inflated values. The jury acquitted Yeager of conspiracy, securities fraud, and wire fraud, but hung on the insider trading charges. When the Government sought retrial on the hung counts, Yeager moved to dismiss, arguing that the Double Jeopardy Clause barred retrial. The district court denied the motion, and the Fifth Circuit affirmed. The Fifth Circuit agreed with Yeager that the jury must have found he had no inside information when it acquitted him of the fraud charges. Nonetheless, the court held that the apparent conflict between the acquittals and the hung counts made it impossible "to decide with any certainty what the jury necessarily determined." The court therefore held that the Double Jeopardy Clause did not bar retrial of the hung counts. In an opinion by Justice Stevens, the Court reversed and remanded.

The Court followed its reasoning from Ashe v. Swenson, 397 U.S. 436 (1970), in which the Court held that the Double Jeopardy Clause includes the doctrine of issue preclusion, which bars "the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." The Court in Ashe stated that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. The Court held that the same result obtains here. "[F]or double jeopardy purposes, the jury' inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." The Court rejected the Fifth Circuit's

conclusion that the conflict between the acquittal and hung counts made it impossible for the court "to decide with any certainty what the jury necessarily determined." "Because a jury speaks only through its verdict, its failure to reach a verdict cannot — by negative implication — yield a piece of information that helps put together the trial puzzle." No way exists "to decipher what a hung count represents," and so ascribing meaning to a hung count in issue-preclusion analysis presumes an ability to identify which factor was at play in the jury room. Guesswork, the Court declared, "should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return."

The Court distinguished the two key precedents relied upon by the Government, Richardson v. United States, 468 U.S. 317 (1984), and United States v. Powell, 469 U.S. 57 (1984). Richardson held that the Government can retry counts on which the jury hangs; it did not "open the door to using a mistried count to ignore the preclusive effect of a jury's acquittal." Powell held that collateral estoppel principles do not override a jury's verdict even where a jury's acquittal and conviction are irrational (e.g., acquitting on a substantive drug charge, but convicting on the charge of using a telephone to commit the drug offense). The Government argued that, just as the acquittal in Powell did not preclude the conviction there, so too should the acquittal of Yeager on some counts not preclude an eventual conviction of Yeager following retrial. The Court disagreed, stating that "the situations are quite dissimilar" because "hung counts have never been accorded respect as a matter of law or history" in the way that jury verdicts have been. As nonevents, hung counts cannot be the basis for assuming juror irrationality, unlike the case of inconsistent acquittals and convictions. Finally, the Court stated that it declined to address whether, in fact, the jury's acquittals of Yeager "necessarily resolved in his favor the issue of ultimate fact that the Government must prove in order to convict him of insider trading." The Court stated that the Fifth Circuit "may revisit its factual analysis in light of the Government's arguments in this Court."

Justice Kennedy in a concurring opinion agreed with the majority in all but the remand order. A sufficient basis exists to question whether Yeager has met the majority's standard, and therefore the Fifth Circuit should be directed, not invited, to revisit its factual analysis. Justice Scalia, joined by Justices Thomas and Alito, dissented. They disagreed with the majority's reliance on Ashe, a decision holding only that the Double Jeopardy Clause sometimes bars successive prosecution of facts found during "a prior proceeding." In the dissent's view, under the Court's established principles of "continuing jeopardy," a retrial of a hung count is not a new proceeding but rather a continuation of the same criminal proceeding that had not run its full course. A retrial of Yeager would not, therefore, put him in jeopardy a second time. The jury inconsistency here, therefore, was no different than the inconsistency in Powell and should be treated the same way. Justice Alito filed a separate dissenting opinion, joined by Justices Thomas and Scalia, asserting that Ashe adopted a strict standard that an acquittal on one charge precludes a subsequent trial on a different charge only if "a rational jury" could not have acquitted on the first charge without finding in the defendant's favor on a factual issue that the prosecution would have

to prove in order to convict in the later trial. Reviewing the record here, Justice Alito concluded "there is reason to question whether the Ashe standard was met." In his view, the Fifth Circuit should reexamine the possible grounds for the fraud count acquittals.

● *Melendez-Diaz v. Massachusetts, 07-591.* By a 5-4 vote, the Court held that under *Crawford v. Washington*, 541 U.S. 36 (2004), an affidavit reporting the results of a state drug laboratory's analysis is "testimonial," and that a criminal defendant is therefore entitled under the Confrontation Clause to cross-examine the analyst who prepared the affidavit. During petitioner Luis Melendez-Diaz=s trial for drug distribution and trafficking, the prosecution offered notarized certificates reporting forensic analysis results that showed substances found in Melendez-Diaz=s possession were cocaine. The trial court admitted the certificates without the analysts' testimony over Melendez-Diaz=s objection based on *Crawford*. Melendez-Diaz was eventually convicted and sentenced to three years imprisonment. The state appellate court affirmed the conviction, rejecting the *Crawford* claim based on Massachusetts Supreme Judicial Court precedent holding that drug analysis certificates fall within "the public records exception to the confrontation clause." The Massachusetts Supreme Judicial Court denied review without comment. In an opinion by Justice Scalia, the Court reversed.

In *Crawford,* the Court held that a witness' testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. The issue here was whether the drug lab certificate was "testimonial" and therefore subject to that rule. The Court held that "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements'" described in *Crawford*. They are affidavits; they are a "solemn declaration or affirmation made for the purpose of establishing or proving some fact"; they are "functionally identical to live, in-court testimony"; and their "*sole purpose* . . . was to provide prima facie evidence" for the state's case at trial. (Internal citations omitted.) Accordingly, Melendez-Diaz was entitled to confront the analysts at trial to challenge the affidavit's conclusion that the seized substances were cocaine. The Court rejected the "potpourri of analytic arguments" offered by the state and the dissent "to avoid this rather straightforward application of our holding in *Crawford*." First, the Court insisted it was not sweeping away a long-settled rule governing the admission of scientific evidence. The vast majority of the state-court cases the dissent cites in support of this claim rely on the overruled decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), or its since-rejected theory that unconfronted testimony was admissible as long as it bore indicia of reliability.

The Court next rejected the contention that the analysts should excepted from confrontation because they are neither directly "accusatory" witnesses nor "conventional" witnesses. The Court found no authority for the proposition that the Confrontation Clause does not apply to testimony that "is inculpatory only when taken together with other

evidence linking petitioner to the contraband." The analysts here "certainly provided testimony *against* petitioner, proving one fact necessary for conviction — that the substance he possessed was cocaine." Nor does it matter, held the Court, that the analysts do not represent the "paradigmatic confrontation violation." "[T]he paradigmatic case identifies the core of the right to confrontation, not its limits." And no authority supports the proposition, advanced by the dissent, that the Clause does not apply to witnesses who "observe[d] neither the crime nor any human action related to it" or whose "statements were not provided in response to interrogation." Those proposed limits would wrongly exclude from the Clause's coverage "a police officer's investigative report describing the crime scene" and statements voluntarily made by witnesses. The Court also rejected the contention that testimony that is the "resul[t] of neutral, scientific testing" should be exempt from the Clause's coverage. To exempt scientific findings because they are inherently reliable "is little more than an invitation to return to our overruled decision in *Roberts*." Moreover, citing to the recent study by the National Academy of Sciences, the Court observed that "[f]orensic evidence is not uniquely immune from the risk of manipulation" or incompetence. For this reason, "there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency and methodology."

The Court also rejected the contention that the analysts' affidavits are official or business records that are exempt from confrontation concerns. The Court held that business and official records were only admissible at common law when they were kept in the regular course of business — except "if the regularly conducted business activity is the production of evidence for use at trial," such as accident reports. And although "a clerk's certificate authenticating an official record — or copy thereof — for use as evidence" was "traditionally admissible," the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." Nor, held the Court, does a defendant's ability to subpoena analysts eliminate the Confrontation Clause violation. That power, be it under state law or the Compulsory Process Clause, "is not a substitute for the right of confrontation," which "imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Finally, the Court rejected the state and dissent's reliance on the practical problems the Court's holding would create. "The Confrontation Clause . . . is binding, and we may not disregard it at our convenience." In addition, the Court doubted the practical problems would be significant. Most cases end with guilty pleas. And "[m]any States have already adopted the constitutional rule we announce today," yet "there is not evidence that the criminal justice system has ground to a halt in th[ose] States." In discussing this point, the Court expressly stated that basic "notice and demand" statutes — which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which a defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial" — are constitutional. Finally, the Court expressed its belief that defense attorneys will usually stipulate to affidavits' findings because live testimony will typically "highlight rather than cast doubt upon the forensic analysis."

Justice Kennedy filed a dissenting opinion that Chief Justice Roberts and Justices Alito and Breyer joined. The dissent pointed first to the confusion the Court's decision creates as to who must testify: the person who sets up the drug test, the person who interprets the machine print out, the person who calibrated the machine, and/or the person ("perhaps the laboratory's director") who certified the results. "The Court offers no principles or historical precedent to determine which of these persons is the analyst." And the problem extends to other contexts. For example, "[t]he iron logic of which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody." Nor, argued the dissent, does requiring their testimony serve the purposes of the Confrontation Clause. "It is not plausible that a laboratory analyst will retract his or her prior conclusion upon catching sight of the defendant the result condemns. . . . And an analyst performs hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant." In the dissent's view, the game is not worth the candle. "For the sake of these negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician . . . simply does not or cannot appear." The dissent found that the Constitution does not require this unfortunate result. "No historical evidence supports the Court's conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant." The Confrontation Clause applies to someone who is a "witness," and analysts are not witnesses in the ordinary sense.

● *Safford Unified School District #1 v. Redding, 08-479.* By an 8-1 vote, the Court held that a strip search of a 13-year-old schoolgirl suspected of having given ibuprofen to a classmate violated the Fourth Amendment; but by a vote of 7-2, the Court held that the school officials responsible were shielded by qualified immunity. Thirteen-year-old Savana Redding was required to strip to her underwear and to pull out her bra and panties in a search for prescription-strength ibuprofen tablets. This occurred after a student reported to Assistant Principal Kerry Wilson that he had been given a pill by Marissa Glines, and Glines, following a search of her belongings that produced a few additional pills, claimed to have gotten the drugs from Redding. The search of Redding's clothes and person revealed no contraband. Her mother sued the school district and the school officials responsible for the search for violating Redding's Fourth Amendment rights. The district court granted the school officials' motion for summary judgment based on qualified immunity, and the Ninth Circuit affirmed. On en banc rehearing, however, a divided Ninth Circuit held that the search violated the Fourth Amendment under the test established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and that the law was "clearly established" at the time of the search, thus precluding the qualified immunity defense. In an opinion by Justice Souter, the Court affirmed the Fourth Amendment holding, but reversed the qualified immunity holding.

The Court began with the "reasonable suspicion" standard established in *T.L.O.*: "a school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" The Court explained that "reasonable suspicion" in the context of a school search means there must be "a moderate chance of finding evidence of wrongdoing." Turning to the specific facts of this case, the Court noted that the school had a zero-tolerance policy towards drugs of any kind; that Wilson had heard the week before that students were passing pills around at school; that Glines and Redding were friendly; and that Wilson was aware of allegations made by another student that Redding had given classmates alcohol before a school dance earlier in the year. This information, in the Court's view, made "Marissa's statement that the pills came from Savana . . . sufficiently plausible to warrant suspicion that Savana was involved in pill distribution." And that suspicion "was enough to justify a search of Savana's backpack and outer clothing." The Court drew the line there, however.

Expressly declining to parse out different levels of strip searches, the Court held that the "very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outing clothing and belongings." The Court concluded that, "[h]ere, the content of the suspicion failed to match the degree of intrusion." The Court reasoned that Wilson knew he was looking for ibuprofen, a relatively innocuous pain reliever; and that he had no particularized basis for imagining that Redding had concealed pills in her underwear. "In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable." The Court then turned to the qualified immunity question. Although it declined to hold that "disuniform views of the law" among the lower courts would "automatically render the law unclear if we have been clear," in this case it held there were enough "well-reasoned majority and dissenting opinions to counsel doubt" about how clearly established the law was. Accordingly, qualified immunity was warranted.

Justice Stevens, joined by Justice Ginsburg, joined the majority's holding that the search violated the Fourth Amendment, but disagreed that the school officials were entitled to qualified immunity. Justice Stevens commented that "[t]his is, in essence, a case in which clearly established law meets clearly outrageous conduct." Justice Ginsburg, concurring in part and dissenting in part, took the same view as Justice Stevens: "Here, 'the nature of the [supposed] infraction,' the slim basis for suspecting Savana Redding, and her 'age and sex,' establish beyond doubt that Assistant Principal's Wilson's order cannot be reconciled with this Court's opinion in *T.L.O.* Wilson's treatment of Redding was

abusive and it was not reasonable for him to believe that the law permitted it." Justice Thomas also concurred in part and dissented in part, but he argued that the school officials were entitled to immunity because the search did not violate the Fourth Amendment. In his view, the Fourth Amendment required only that the search be based on reasonable suspicion and that the pills sought could have been hidden in the places searched. He criticized the Court's ruling as "vague and amorphous" and expressed fear that it "grants judges sweeping authority to second-guess the measures that [school] officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge." Justice Thomas also reiterated the view set forth in his concurring opinion in *Morse v. Frederick*, 551 U.S. 393, 414 (2007), that "the Court should return to the common-law doctrine of *in loco parentis*," under which "schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms."

● *Hedgpeth v. Pulido, 07-544.* Through a per curiam opinion, the Court unanimously held that the Ninth Circuit erred when it granted habeas relief to respondent on the ground that an erroneous jury instruction on one of two alternative theories of guilt was "structural error." And by a 6-3 vote, the Court remanded for application of the traditional habeas harmless error test: whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619 (1993). Respondent Michael Pulido was convicted of felony murder for a killing during a gas station robbery. The jury could not reach a verdict on the charges that Pulido personally shot the victim; it therefore necessarily convicted him as an aider and abettor. The jury instructions permitted the jury to convict Pulido as an aider and abettor if he formed the intent to aid and abet the underlying felony either (1) before or (2) after the killing. The California Supreme Court held that theory (2) was incorrect under state law, but that the erroneous instruction on that theory had not prejudiced Pulido because verdict forms showed that the jury believed the murder was commited while respondent was engaged in the robbery. In federal habeas proceedings, the district court granted relief, concluding that the erroneous instruction was not harmless under Brecht. The Ninth Circuit affirmed but on different grounds. Relying on Stromberg v. California, 283 U.S. 359 (1931), the court held that when the jury returns a general verdict after being instructed on a valid and invalid theory, the error is structural — that is, the conviction must automatically be reversed because it is impossible to tell whether the jury convicted on the valid or invalid theory. The Supreme Court reversed.

The Court stated that Stromberg pre-dated Chapman v. California, 386 U.S. 18 (1967), which held that constitutional errors can be harmless. Since Chapman, the Court has consistently held that instructional errors are subject to review for harmlessness. See, e.g., Neder v. United States, 527 U.S. 1 (1999) (omission of an element of the offense); Pope v. Illinois, 481 U.S. 497 (1987) (misstatement of an element of an offense). Although those cases did not involve jury instructions on multiple theories of guilt, the Court found

the distinction immaterial. "An instructional error arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." Pulido conceded that the error in his case was not structural error; instead, he argued that the Ninth Circuit had "effectively engaged in the Brecht analysis." The Court disagreed, concluding that the Ninth Circuit's fleeting mention of Brecht did not amount to a finding that the error was harmless. Justice Stevens filed an opinion dissenting on that point, which Justices Souter and Ginsburg joined. The dissent argued that, although the Ninth Circuit used the wrong label ("structural error"), it had actually applied Brecht when it concluded that there was a "possibility that the jury convicted Pulido on a legally impermissible theory." In the dissent's view, the lower court reached the right result and the Court should not have taken the case.

● *Waddington v. Sarausad, 07-772.* By a 6-3 vote, the Court held that the Ninth Circuit erred when it granted habeas relief to a Washington prisoner based on its conclusion that the pattern accomplice-liability jury instructions given in his trial were ambiguous and created a reasonable likelihood that the jury would misapply state law. The case arose from a fatal drive-by shooting at a Seattle high school. Respondent Cesar Sarausad was the driver of the car in which the shooter was a passenger. Sarausad was convicted as an accomplice to second-degree murder, attempted murder, and assault. At trial, the jury was given two instructions on accomplice liability under the Washington statute. The instructions stated that a person is legally accountable for the conduct of another when he is an accomplice in *the crime* at issue, and when he solicits, encourages, aids or agrees to aid the commission of *the crime* with knowledge that it will promote or facilitate its commission. In the course of rejecting Sarausad's appeal, the Washington Court of Appeals described accomplice liability "as a theory of criminal liability that in Washington has been reduced to the maxim, 'in for a dime, in for a dollar.'" Shortly thereafter, in a different case, the Washington Supreme Court clarified that "in for a dime, in for a dollar" is an inapt metaphor because an accomplice must have knowledge of "the crime" that occurs, not merely that "a crime" might occur. Sarausad then sought post-conviction relief in the Washington state courts, arguing that the prosecution improperly argued that he had been "in for a dime, in for a dollar." The Washington Court of Appeals again rejected the claim, finding that the focus of the prosecutor's closing argument was not that Sarausad should be found guilty as an accomplice to murder even if he intended only a fistfight. Rather, with one exception, the prosecutor used the "in for a dime, in for a dollar" phrase to covey the "gang mentality" that requires gang members to avenge wrongs by any means necessary. The court concluded that the one possibly problematic use of the phrase by the prosecutor did not prejudice Sarausad. A federal district court granted habeas relief to Sarausad, finding that the jury was most likely confused by the standard for accomplice liability. The Ninth Circuit affirmed, holding that there was a reasonable likelihood the jury misapplied the instruction, and that the state post-conviction court was objectively unreasonable in concluding otherwise. In an opinion by Justice Thomas, the Court reversed.

The Court noted that a defendant bears a "heavy burden" when he "seeks to show constitutional error from a jury instruction that quotes a state statute. It is not enough to show that the instructions were ambiguous. Nor is it enough to show that there is a "slight possibility" that the jury misapplied the statute. Rather, the jury must show "that there was a 'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Put another way, the defendant must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process" (internal quotation marks omitted). The Court concluded that Sarausad failed to meet that standard. First, the state courts reasonably concluded that the jury instructions here were not ambiguous on their face, for they plainly required a finding that Sarausad knowingly facilitating "the crime," not "a crime." And although the Washington Court of Appeals expressed some confusion regarding the instruction, that confusion pertained to the "legally distinct[] question whether an accomplice is required to share the specific intent of the principal actor under Washington law."

The Court next held that, even if the instructions were ambiguous, any ambiguity did not cause a federal due process violation. The prosecutor consistently argued that Sarausad had knowledge that his conduct would promote or facilitate the drive-by shooting. In short, there was no evidence of juror confusion as to the test for accomplice liability in this case. The Ninth Circuit's reasons for concluding otherwise — that the evidence of Sarausad's guilt was "thin"; that the prosecutor made an "in for a dime, in for a dollar" argument; and that the jury asked questions to the judge regarding the instructions — did not withstand scrutiny. On the latter point, the Court held that it "has determined that the Constitution generally requires nothing more from a trial judge than the type of answers given to the jury here," namely, directing the jury's attention to the specific paragraph of the instructions that spoke to the question.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented. The dissent argued that the jury may have thought it could convict the defendant as an accomplice to murder on the theory that he assisted in what he expected to be a mere assault. The dissent emphasized the confusion that Washington state courts have had with the instruction, including the Washington Court of Appeals' error in this case. In its post-conviction ruling, the court acknowledged that it "erred" when it held that "an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned activity." In the dissent's view, the confusion regarding the instruction was amplified by the prosecutor's closing statement and confirmed by the jury's questions, which "repeatedly asked the court to clarify the law on accomplice liability." Accordingly, the "District Court and the Ninth Circuit drew the only conclusion reasonably possible on this record."

● *Knowles v. Mirzayance, 07-1315.* The Court unanimously reversed a Ninth Circuit decision granting habeas relief to a petitioner who claimed ineffective assistance of counsel after his trial attorney persuaded him not to pursue an insanity defense at the sentencing stage because the lawyer believed it had no chance of success. Alexandre Mirzayance confessed to stabbing and then shooting his cousin. He pled not guilty and not guilty by reason of insanity (NGI) at trial. Under California law, this required a bifurcated trial: the first stage addressed guilt, the second the viability of the insanity plea. During the first stage, Mirzayance argued for conviction on the lesser included charge of second-degree murder by offering evidence of mental illness to show he lacked the necessary premeditation and deliberation for first-degree murder. But the jury rejected this argument and convicted him of first-degree murder. As a result, his attorney feared that he would not prevail at the NGI stage, because the burden of proof lay with him to establish the insanity defense and the same jury had already found beyond a reasonable doubt that he acted with deliberation and premeditation. The only additional evidence Mirzayance had to offer at the NGI stage was the lay, emotional testimony of his parents describing his struggles with mental illness. At the last minute, however, his parents decided they would not testify after all. At that point, Mirzayance's counsel advised him to abandon the NGI plea and he agreed to do so. After sentencing, Mirzayance pursued post-conviction relief in the state courts, arguing that the advice to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The California courts rejected this claim.

Mirzayance filed for habeas relief in the federal courts under 28 U.S.C. §2254. After an evidentiary hearing ordered by the Ninth Circuit, a Magistrate Judge issued factual findings that were consistent with the above description. The Magistrate Judge therefore found that counsel's decision not to go forward with the NGI plea was "carefully reasoned" and did not constitute deficient performance. Despite this, because the Magistrate Judge understood the Ninth Circuit's remand instructions to require him to find ineffective assistance of counsel if he could determine no tactical *advantage* to withdrawing the NGI plea, and he found that Mirzayance had "nothing to lose" by pursuing the plea, he ruled that counsel was deficient. He also determined that there was prejudice to Mirzayance, based on the Ninth Circuit's statement in the remand order describing the NGI defense as "viable and strong." He therefore recommended granting the writ. The district court accepted the recommendation and the Ninth Circuit affirmed. In an opinion by Justice Thomas, the Court reversed.

Applying the standard of review provided by 28 U.S.C. §2254(d)(1), the Court held that the decision of the California court to deny Mirzayance's ineffective assistance of counsel claim did not violate clearly established federal law. The Court explained that it had never adopted anything comparable to the "nothing to lose" standard the Ninth Circuit employed for evaluating Mirzayance's *Strickland* claim. Instead, habeas relief can only be granted if the state court unreasonably applied the general two-part *Strickland* test. The Court concluded that "[u]nder the doubly deferential judicial review that applies to a

Strickland claim evaluated under the §2254(d)(1) standard . . ., Mirzayance's ineffective-assistance claim fails. It was not unreasonable for the state court to conclude that this defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success." (Justices Scalia, Souter, and Ginsburg did not join this portion of the opinion.)

Indeed, held the Court, Mirzayance's ineffective assistance claim would fail even if it were reviewed *de novo*. The Court found that the jury's ruling on the guilty phase (rejecting Mirzayance's mental state argument) coupled with the parents' refusal to testify made it eminently reasonable for counsel to conclude that his NGI defense "was almost certain to lose." The Court criticized the Ninth Circuit for finding that "the situation was not so dire because the parents 'merely expressed reluctance to testify.'" The Magistrate Judge found precisely the opposite. Likewise, the Ninth Circuit erred in holding that "counsel acted on his subjective feeling of hopelessness without even considering the potential benefit to be gained in persisting with the plea." Again, the Ninth Circuit ignored the Magistrate Judge's contrary factual finding that counsel undertook a "thorough investigation." The Court declared that "courts of appeal may not set aside a district court's factual findings unless those findings are clearly erroneous," and that the Ninth Circuit acted improperly when it "overturned the lower court's factual findings related to counsel's behavior" without even "mention[ing] the clearly-erroneous standard, let alone apply[ing] it." The Court concluded that, given the Magistrate Judge's factual findings, the state court reasonably applied *Strickland* when it rejected Mirzayance's claim. "The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason — above and beyond a reasonable appraisal of a claim's dismal prospects for success — for recommending that a weak claim be dropped altogether." Finally, the Court noted that Mirzayance also could not show prejudice. "It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase." The Court remanded with instructions to deny the habeas petition.

● *Cone v. Bell, 07-1114.* By a 7-2 vote, the Court held that the Tennessee courts' procedural rejection of the defendant's *Brady v. Maryland* claim did not bar federal habeas review of that claim. In 1981, defendant/petitioner Gary Cone was convicted by a jury in a state court of two murders and was sentenced to death. Following his direct appeal and the filing of a state post-conviction application, Cone discovered the prosecution had failed to disclose witness statements and police reports that purportedly supported his insanity and mitigation defenses that his actions were the product of post-traumatic stress disorder and a drug addiction. Cone amended his post-conviction application to include the *Brady* claim. The state trial court denied the claim, and the Tennessee Court of Criminal Appeals affirmed, on the mistaken ground that Cone previously raised the claim on direct appeal and it had been denied. (Cone had raised a similar state-law claim, but not a *Brady* claim,

on direct appeal.) A federal habeas court held that Cone procedurally defaulted his *Brady* claim. The Sixth Circuit affirmed on that ground and, alternatively, on the basis that Cone's documents were not *Brady* material in any event. The Sixth Circuit granted habeas relief on other grounds, but the Supreme Court reversed. On remand, the Sixth Circuit repeated its prior holdings on Cone's *Brady* claim. In an opinion by Justice Stevens, the Court vacated the Sixth Circuit's judgment and remanded to the district court with instructions to give a full merits consideration to the *Brady* claim insofar as it challenges Cone's sentence.

The Court held that the Sixth Circuit erred in rejecting Cone's *Brady* claim as procedurally defaulted on the ground that it was twice presented to the state courts. "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration -- not when the claim has been presented more than once. The Court also rejected the state's contention that the state appellate court rejected Cone's claim based on waiver, not because it had been previously determined. The Court read the Tennessee Court of Criminal Appeals' decision as denying "Cone's *Brady* claim on the same mistaken ground offered by the lower court -- that the claim had been previously determined."

The Court then turned to the merits of Cone's *Brady* claim. Because the Tennessee courts did not reach the merits of the claim, the Court reviewed it *de novo.* The Court noted that "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." Turning to the facts here, the Court concluded that the suppressed evidence fails to sustain Cone's insanity defense. Although "[t]he suppressed evidence may have strengthened the inference that Cone was on drugs or suffering from withdrawal at the time of the murders, . . . his behavior before, during, and after the crimes was inconsistent with the contention that he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." The Court ruled, however, that the evidence might be material to punishment even if it is not material to guilt, particularly given "the far lesser standard that a defendant must establish to qualify evidence as mitigating in a penalty hearing in a capital case." The Court found that the suppressed evidence "strengthens the inference that Cone was impaired by his use of drugs around the time his crimes were committed" and that it is "possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge." This could have "a mitigating, though not exculpating, role in the crimes he committed." The Court therefore ordered the district court to conduct "a full review of the suppressed evidence and its effect" on sentencing.

Chief Justice Roberts filed a brief concurring opinion noting that (1) the case merely involved "application of the accepted legal standard [*Brady*] to the particular facts," and (2) "the lower courts should analyze the issue under the *constitutional* standards we have set forth, not whatever standards the American Bar Association may have established." Justice Alito filed an opinion that concurred in part and dissented in part. In his view, Cone never fairly raised his *Brady* claim in the state courts, which means the claim is either not exhausted or is procedurally defaulted. Finally, Justice Thomas, joined by Justice Scalia, dissented with respect to the Court's remand on Cone's sentencing claim. The dissent disagreed that the Sixth Circuit summarily treated Cone's *Brady* sentencing claim. In the dissent's view, the actual contested issue at trial and sentencing was not whether Cone used drugs, but rather the quantity of his drug use and its effect on his mental state. With the legal and factual issues correctly framed, Cone cannot establish a reasonable probability that admission of the new evidence — viewed either individually or cumulatively — would have caused the jury to alter his sentence.

● *Bobby v. Bies, 08-598. The Court unanimously held that the issue preclusion component of the Double Jeopardy Clause does not bar a state from asserting at a post-Atkins hearing that a death-sentenced inmate is not mentally retarded when the state courts had previously held in pre-Atkins proceedings that the inmate's "borderline mental retardation" constituted mitigating evidence at sentencing. In Atkins v. Virginia, 536 U.S. 304 (2002), the Court held that the Eighth Amendment's prohibition of "cruel and unusual punishments" bars execution of mentally retarded offenders. Before Atkins, the Court had determined that mental retardation merited consideration as a mitigating factor, but did not bar imposition of the death penalty. Respondent Michael Bies was convicted of capital murder in 1992, and was given the death sentence.* The Ohio Supreme Court, in its 1996 opinion affirming the sentence on direct review, observed that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but concluded that "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." After the U.S. Supreme Court issued its Atkins decision, Bies presented an Atkins claim to the Ohio trial court and moved for summary judgment on the ground that the Ohio courts had already found that he was mentally retarded. The state trial court denied the motion and ordered a full hearing on the question of Bies' mental capacity. Bies then asked a federal habeas court to hold that the Double Jeopardy Clause barred the state from relitigating the issue. The district court granted the habeas petition and ordered that Bies' death sentence be vacated. The Sixth Circuit affirmed, reasoning that the Ohio Supreme Court, in 1996, had definitively determined, as a matter of fact, Bies' mental retardation. That finding, the Sixth Circuit concluded, established Bies' "legal entitlement to a life sentence"; the Double Jeopardy Clause therefore barred any renewed inquiry into the matter of Bies' mental state. Finding that the Sixth Circuit "fundamentally misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component," the Court reversed in an opinion by Justice Ginsburg.

The Court first rejected the contention set forth in Judge Clay's opinion concurring in the denial of rehearing that, under Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), Bies had been "acquitted" of the death sentence and therefore had a "legal entitlement to [a] life sentence." The Court found that "Sattazahn offers Bies no aid." The Court underscored that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" And "[h]ere, as in Sattazahn, there was no acquittal. Bies' jury voted to impose the death penalty," and Ohio sought no further prosecution or punishment. The Court next rejected the Sixth Circuit's conclusion that the doctrine of issue preclusion, found to be embodied in the Double Jeopardy Clause in Ashe v. Swenson, 397 U.S. 436 (1970), barred the state court hearing. The doctrine of issue preclusion requires that the prior litigation actually determine an issue that "is essential to the judgment." Here, however, "it is not clear from the spare statements of the Ohio appellate courts that the issue of Bies' mental retardation under [Atkins] was actually determined at trial or during Bies' direct appeal." Second, "it is clear that the courts' statements regarding Bies' mental capacity were not necessary to the judgments affirming his death sentence." Although the Ohio courts had to address the mitigating evidence of mental retardation, the courts' "subsidiary finding" that he had mild to borderline mental retardation was not necessary to its judgment. To the contrary, the existence of that mitigating factor "cut against" the courts' ultimate conclusion that the death penalty could be imposed on Bies. "Issue preclusion cannot transform Bies' loss at the sentencing phase into a partial victory." Third, "even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in Atkins." States had far less incentive to dispute defendants' assertion of mental retardation before Atkins than after that decision was issued. In the end, held the Court, "[r]ecourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the Atkins decision. . . . The State . . . rightly seeks a full and fair opportunity to contest [Bies'] plea under the postsentencing precedents set in Atkins and" in the state court decision implementing Atkins.

● *District Attorney's Office for the Third Judicial District v. Osborne, 08-6.* By a 5-4 vote, the Court held that there is no constitutional right to obtain postconviction access to evidence for DNA testing. Respondent William Osborne was convicted of kidnapping, assault, and sexual assault for participating in a 1993 attack on an Anchorage prostitute. Part of the evidence against him was semen in a condom used in the attack. An early, imprecise form of DNA testing of the condom placed Osborne within the 16% of African-Americans who could have committed the crime. Restriction-fragment-length-polymorphism (RFLP) DNA testing, a more accurate test, was also available at the time, but Osborne's defense attorney did not pursue it because she feared the RFLP results would prove that Osborne was guilty. Osborne sought postconviction relief in state court, arguing that Alaska's postconviction statute, Alaska Stat. §12.72, and the state and federal constitutions required that he be permitted access to the biological evidence to conduct DNA testing. He also argued that his lawyer's decision not to pursue RFLP testing at trial

constituted ineffective assistance of counsel. The Alaska Court of Appeals held that the decision was strategic and rejected Osborne's ineffective-assistance claim. The court also held that §12.72 did not apply to DNA testing that had been available at the time of trial; found no basis in U.S. Supreme Court precedents for the claimed federal constitutional right to DNA evidence; and held that Osborne had failed to establish a state constitutional right to the evidence because the other evidence of his guilt was too strong (including confessions made as part of parole applications) and RFLP testing would not be conclusive of his guilt or innocence. While his postconviction application was pending in the state courts, Osborne filed a §1983 case in federal district court claiming a constitutional right to access to the biological evidence so that he could obtain short-tandem-repeat (STR) DNA testing, a newer and much more accurate form of DNA testing. Through a pair of rulings, the Ninth Circuit held that (1) the claim was properly brought through a §1983 action, and (2) the Due Process Clause extends the government's pretrial obligation to disclose exculpatory evidence, elucidated in Brady v. Maryland, 373 U.S. 83 (1963), to post-conviction proceedings. Osborne had a "'potentially viable' state constitutional claim of 'actual innocence'" and there was a "'well-established assumption' that a similar claim arose under the Federal Constitution." The Court, in an opinion by Chief Justice Roberts, reversed.

The Court began its analysis by identifying the difficult balance that had to be struck between the power of DNA to conclusively resolve some, though not all, criminal cases, and the importance of finality in the criminal justice system. That balance, it noted, is primarily for the legislature to resolve. And, indeed, 46 states and the federal government have already enacted legislation to deal with the issues relating to access to DNA evidence. These statutes establish a variety of limitations or conditions on access, such as a requirement of materiality, a sworn statement that the applicant is actually innocent, and (in many states) a diligence requirement. Although Alaska is one of the few states yet to address the DNA issue with specific legislation, the Court noted that Alaska has a general postconviction relief statute (§12.72) that allows prisoners to challenge their convictions when "there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." And the Alaska Court of Appeals held in a separate case "that these procedures are available to request DNA evidence for newly available testing to establish actual innocence." Moreover, the Alaska Court of Appeals held that a prisoner may obtain DNA evidence under the Alaska Constitution if he shows "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." Having laid out this background, the Court turned to Osborne's claims.

The Court "assumed without deciding" that the Ninth Circuit was correct in holding that Osborne could pursue his claim under §1983 rather than through a habeas proceeding. Turning instead to the merits, the Court first addressed whether Alaska violated Osborne's procedural due process rights. The Court held that, although Osborne has no liberty interest in state executive clemency, he does "have a liberty interest in

demonstrating his innocence with new evidence under state law." The Court stated, however, that the Ninth Circuit "went too far . . . in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest." In particular, the Court rejected the Ninth Circuit's use of the Brady framework to analyze the due process question before it. "Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation'" (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)). Applying that test, the Court found "nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."

In particular, the Court noted that "Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has — through judicial decision — specified that this discovery procedure is available to those seeking access to DNA evidence. . . . These procedures are similar to those provided for DNA evidence by federal law and the law of other States, and they are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" Moreover, the Court noted that Osborne had not actually pursued the state's procedures. And although the Court explicitly disavowed an exhaustion requirement, it held that Alaska's "procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." Finally, the Court considered and rejected Osborne's argument that he also had a freestanding, substantive due process right to access the DNA evidence, "untethered from the liberty interests he hopes to vindicate with it." The Court noted that "[t]here is no long history of such a right", and expressed its reluctance to interfere with the "prompt and considered legislative response" to the concerns raised by DNA evidence by constitutionalizing the issue. "We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA."

Justice Alito, joined by Justice Kennedy and Justice Thomas in part, concurred. In the part of the concurrence joined by Justice Kennedy, Justice Alito argued that Osborne should have pursued his quest for access to the DNA evidence by filing a habeas petition, not a §1983 action. He noted that an ordinary Brady claim must be filed in habeas, and rejected the notion that §1983 actions may be used as "a discovery tool to lay the foundation for a future state" action. "The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading." In the part of his concurrence joined by both Justices Kennedy and Thomas, Justice Alito pointed out the complications surrounding the handling of DNA evidence, ranging from problems of sample quality and contamination to the severe backlog in state and federal crime laboratories. In his view, this cut strongly against providing a

constitutional right to postconviction DNA testing for a defendant who declined DNA testing at trial.

Justice Stevens, joined by Justices Ginsburg, Souter, and Breyer, dissented. Although he agreed with the majority that Alaska's statute providing a right to postconviction relief based on new evidence of innocence was not "facially deficient," Justice Stevens argued that "the state courts' application of [the statute] raises serious questions whether the State's procedures are fundamentally unfair in their operation." Justice Stevens noted that the "touchstone of due process is protection of the individual against arbitrary action of government," and found Alaska's failure to provide any real explanation for its refusal to give Osborne access to the evidence demonstrative of the arbitrary nature of its position. For this reason, concluded Justice Stevens, Osborne has a due process right to test the evidence in the state's possession in the circumstances of this case. Justice Stevens also would have held that Osborn has a substantive due process right to the evidence. "When government action is so lacking in justification that it can properly be character-ized as arbitrary or conscience shocking, in a constitutional sense, it violates the Due Process Clause" (internal quotation marks and citations omitted). Finally, Justice Stevens compared the majority's reliance on state law to the Court's holding in Powell v. Alabama, 287 U.S. 45 (1932), that "state law alone governed the manner in which counsel was appointed for indigent defendants." "[A] decision to recognize a limited right to postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary." Justice Souter, also dissenting, wrote separately to note his view that because Alaska "does not flatly deny access to evidence for DNA testing in postconviction cases," the Court need not at this time consider whether there is a freestanding substantive due process right to such access.

● *Spears v. United States, 08-5721.* By a 5-4 vote, the Court summarily reversed an Eighth Circuit decision which had held that a district court may not reject the 100:1 ratio between powder cocaine and crack cocaine quantities set forth in the Federal Sentencing Guidelines. In a *per curiam* opinion, the Court clarified that in *Kimbrough v. United States*, 552 U.S. ___ (2008), it held "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." Petitioner Steven Spears was found guilty of conspiracy to distribute at least 50 grams of cocaine base and at least 500 grams of powder cocaine. At his sentencing, the district court calculated his sentence under the Guidelines, and concluded that the 100:1 ratio between powder cocaine and crack cocaine quantities yielded an excessive sentence. The court therefore recalculated Spears' offense level based on a 20:1 crack-to-powder ratio. Spears was then sentenced to the statutory mandatory minimum under the recalculated offense level. The Eighth Circuit reversed Spears' sentence and remanded for resentencing, ruling that "neither *Booker* nor [18 U.S.C.] §3553(a) authorizes district courts to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses." The Supreme Court vacated that decision for further consideration in light of *Kimbrough*, but the Eighth Circuit again reversed the sentence, ruling that district

courts cannot categorically reject the ratio set forth in the Guidelines and substitute their own lower ratio.

In again reversing the Eighth Circuit, the Court found that its decision conflicted with *Kimbrough* because that case held that under *United States v. Booker,* 543 U.S. 220 (2005), the cocaine guidelines are advisory only, and therefore district courts have discretion to depart from the Guidelines in particular cases if they find that the crack/cocaine ratio yields an excessive sentence. This is so even if a court has a policy-based categorical disagreement with the ratio. "A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity."

Justice Kennedy would have set the case for oral argument, and Justice Thomas dissented without opinion. Chief Justice Roberts filed a dissenting opinion joined by Justice Alito. This dissent argued that "there are cogent arguments" why the Eighth Circuit's decision was contrary to the decision in *Kimbrough*, but that the error is not "so apparent as to warrant the bitter medicine of summary reversal." The dissent reasoned that at least some language in *Kimbrough* may support the Eighth Circuit's reasoning that district courts are not free to adopt their own categorical crack-to-powder ratios to substitute for the ratio set forth in the Guidelines.

● *Corley v. United States, 07-10441.* By a 5-4 vote, the Court held that 18 U.S.C. §3501(c) modified but did not supplant the *McNabb-Mallory* rule, "under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge." FBI agents suspected Johnnie Corley of bank robbery and arrested him on an outstanding but unrelated state warrant. After taking Corley to a hospital for treatment of arrest-related injuries, the agents took him to FBI offices for interrogation seven hours later. Corley waived his *Miranda* rights, orally confessed his involvement in the charged crimes, and signed a written confession the next day. About 29½ hours following his arrest, the agents presented Corley to a magistrate. Corley sought to suppress his oral and written statements because, although they were voluntary, they were taken more than six hours after his arrest. He relied on Fed. R. Crim. P. 5(a)'s prompt presentment requirement and the holdings in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), which together generally render inadmissible confessions made during periods of detention that violate the prompt presentment requirement of Rule 5(a). The district court denied suppression. A divided panel of the Third Circuit affirmed. The court considered itself bound by circuit precedent holding that §3501 entirely abrogated the *McNabb-Mallory* rule and replaced it with a pure voluntariness test. In an opinion by Justice Souter, the Court reversed.

The dispute centered on the language of 18 U.S.C. §3501. Subsection (a) provides that "a confession . . . shall be admissible if it is voluntarily given"; subsection (b) lists several consider-ations in assessing voluntariness, including the factor that time elapsed "between arrest and before arraignment"; and subsection (c) provides that in any federal

prosecution, "a confession made . . . by . . . a defendant therein, while such person was under arrest . . ., shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made . . . within six hours [of arrest]." The Government argued that §3501(a)'s plain language dictates that, once a district court looks to the considerations in §3501(b) and finds a confession voluntary, the confession can be admitted. Accordingly, argues the Government, subsection (a) entirely eliminates *McNabb-Mallory* with its bar to admitting even a voluntary confession if given during an unreasonable delay in presentment. The Court disagreed, stating that the "fundamental problem with the Government's reading of §3501 is that it renders §3501(c) nonsensical and superfluous." The Court rejected the Government's suggestion that (c) should be read as a "clarifying provision" which "tell[s] courts that delay alone does not make a confession involuntary unless the delay exceeds six hours." Subsection (c) can only be read that way if one reads the terms "inadmissible" and "involuntary" as virtually synonymous, but they are not, particularly in this statute.

The Court also rejected the Government's counterargument that a conflict between (a) and (c) arises under Corley's position because (a) makes all voluntary confessions admissible, but (c) leaves some voluntary confessions inadmissible. The Court held, first, that the more specific provision, (c), trumps the more general provision, (a). More fundamentally, held the Court, (a) "cannot possibly be given its literal scope" because to do so would override many Rules of Evidence, which have long barred introduction of evidence without regard to voluntariness. For example, observed the Court, the Government's position would mean that "a defendant's self-incriminating statement to his lawyer would be admissible despite his insistence on attorney-client privilege." The Court also found that legislative history supports its interpretation. That legislative history shows that subsections (a) and (b) were clearly designed to overrule *Miranda*, while subsection (c) was related to *Mallory*. The *Miranda*-related provisions and the *Mallory*-related provision were separate from each other and adopted by the Senate through separate votes — an exercise that would have been meaningless if (c) added nothing. Moreover, an original draft of (c) was proposed that would have abrogated *McNabb-Mallory* entirely. After several Senators objected to allowing indefinite presentment delays, the provision was amended to its current form, thereby confining but not eliminating *McNabb-Mallory*. Turning to policy, the Court added that the Government's position "would leave the Rule 5 presentment requirement without any teeth" because without *McNabb-Mallory* "there is no apparent remedy for delay in presentment." And the prompt presentment requirement is an important procedural safeguard because it guards against secret custodial interrogations. Finally, the Court rejected the Government's fallback argument that, even if §3501 preserved a limited version of *McNabb-Mallory*, Congress cut out the rule altogether by enacting Federal Rule of Evidence 402 in 1975. The Court remanded the case back to the Third Circuit to apply subsection (c) to the facts of this case.

Justice Alito filed a dissenting opinion, which Chief Justice Roberts and Justices Scalia and Thomas joined. The dissent concluded that there is nothing ambiguous about

the language of §3501(a), which declares that "a confession . . . shall be admissible in evidence if it is voluntarily given." The dissent acknowledged that this would make (c) superfluous, but stated that "[t]here are times when Congress enacts provisions that are superfluous." In the end, found the dissent, in a conflict between the express language of (a) and the "negative implication" drawn from (c), the express language should prevail. The dissent also disagreed with the Court's policy argument, observing that the common law presentment requirement had not been enforced by a rule excluding voluntary confessions, and the Court has never held that states are required to exclude voluntary confessions when they fail to abide by the 48-hour constitutional presentment require-ment announced in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Moreover, *Miranda* itself now provides much of the protection that the *McNabb-Mallory* rule sought to provide. According to the dissent, the legislative history of §3501 suggests nothing more than that "*some Members* of Congress may mistakenly have thought that the version of §3501 that was finally adopted would not displace the *McNabb-Mallory* rule." Lastly, the dissent disagreed that its reading of the statute would override rules of evidence. Congress derived the language it used in §3501 from Court decisions regarding the voluntariness of confessions, none of which suggested that "a voluntary confession must be admitted in those instances in which a standard rule of evidence would preclude admission."

● *Dean v. United States, 08-5274.* Title 18 U.S.C. §924(c)(1)(A)(iii) imposes a 10-year manda-tory minimum "if [a] firearm is discharged" during the commission of a violent crime or a drug trafficking crime. By a 7-2 vote, the Court held that the provision does not implicitly include a mens rea requirement that the firearm be discharged intentionally, rather than accidentally or involuntarily. Petitioner Christopher Michael Dean entered a bank, waved a gun, yelled at everyone to get down, then walked behind the teller counter and started removing money from the teller stations. He grabbed bills with his left hand, holding the gun in his right. As he was collecting the money, the gun discharged, leaving a bullet hole in the partition between two stations. He then dashed out of the bank. Witnesses later testified that he seemed surprised that the gun had gone off. Dean was convicted in federal court of a bank robbery charge and, more pertinent here, of discharging a firearm during a violent crime under §924(c)(1)(A)(iii). The district court imposed the 10-year mandatory enhancement despite Dean's complaint that the gun only discharged accidentally. The Eleventh Circuit affirmed, holding that the plain language of §924(c)(1)(A)(iii) does not contain an intent requirement. In an opinion by Chief Justice Roberts, the Court affirmed.

Section 924(c)(1)(A) provides that when a person "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm," certain mandatory-minimum sentences shall be imposed. Subsection (i) imposes a 5-year mandatory minimum in all such cases; subsection (ii) imposes a 7-year mandatory minimum "if the firearm is brandished"; and subsection (iii) imposes a 10-year mandatory minimum "if the firearm is discharged." Congress separately defined "brandish" to require that the firearm be displayed "in order to intimidate" another person. 18 U.S.C. §924(c)(4). The Court noted at the outset that subsection (iii) does not, on its face, contain a knowledge or intent

requirement, and that its "passive voice focuses on the event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." The Court then contrasted subsection (iii), which is silent on intent, with subsection (ii), which (when combined with §924(c)(4)) does include an intent requirement. The contrast creates a negative inference that Congress intended not to impose an intent requirement in subsection (iii).

The Court rejected Dean's contention that the phrase "during and in relation to" in the statute's opening paragraph modifies the term "discharge" in subsection (iii). Rather, held the Court, "the most natural reading of the statute" is that the phrase modifies only the term "uses or carries." The Court next addressed Dean's contention that a statutory purpose is revealed in the penalty progression in subsections (i) though (iii), which provide increasingly severe penalties for increasingly culpable conduct. Reading an intent requirement into subsection (iii)'s discharge provision, argued Dean, is necessary to effectuate that progression because an accidental discharge is less culpable than intentional brandishment. The Court disagreed, finding that subsection (iii) accounts for the risk of harm resulting from how the crime is carried out, for which the defendant is responsible. An individual who brings a loaded weapon to commit a crime runs the risk of the gun discharging, which, occurring accidentally or not, increases the risk of injury, panic, and responsive violence. Finally, the Court rejected Dean's rule-of-lenity argument, finding the doctrine inapplicable because the statute is not "grievously ambiguous."

Justice Stevens filed a dissenting opinion, which Justice Breyer joined. The dissent concluded that subsection (iii) should not be construed to hold a defendant subject to a mandatory additional sentence — a species of criminal liability — for an accident that caused no harm. The dissent agreed with Dean that the progression of increased punishments shows that Congress intended only intentional discharges to be covered. The dissent also relied on the common-law presumption that provisions imposing criminal penalties require proof of mens rea. The Court found no basis to exclude mandatory minimum sentencing provisions from the scope of that rule.

● *Flores-Figueroa v. United States, 08-108.* Under 18 U.S.C. §1028A(a)(1), a mandatory consecutive two-year sentence enhancement is imposed on anyone who, in the course of committing certain other offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The Court held that this crime of aggravated identity theft requires the Government to show that the defendant knew that the "means of identification" in fact belonged to "another person." Accordingly, a person cannot be convicted of aggravated identity theft merely upon a showing that he knowingly used a false Social Security number. The Government must also show that he knew the Social Security number was assigned to another person.

Ignacio Flores-Figueroa is a citizen of Mexico who sought employment in the United States. In 2000, to accomplish that objective, he gave his employer a false name, birth date, and Social Security number, and presented a counterfeit alien registration card.

Neither the Social Security number nor the number on the alien registration card belonged to anyone else. In 2006, Flores presented his employer with new counterfeit Social Security and alien registration cards. These cards used his real name, but this time the numbers on the two cards were assigned to other people. Flores' employer reported his employment request to immigration authorities. The United States then charged him with several predicate crimes (based on violations of the immigration laws) and with aggravated identity theft under §1028A(a)(1). Flores moved for judgment of acquittal on the aggravated identity theft counts because the Government could not prove that he knew the number on the cards had been assigned to other people. The district court denied the motion. After a bench trial, the court found Flores guilty of the predicate crimes and aggravated identity theft. The Eighth Circuit affirmed, holding that to obtain a conviction under §1028A(a)(1), the Government does not have to prove that the defendant knew the numbers were assigned to other people. In an opinion by Justice Breyer, the Court reversed.

The Court found that, "[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." Accordingly, "knowingly" modifies not only "transfers, possesses, or uses, without lawful authority," but also the phrase "a means of identification of another person." The Court did not accept the Government's contention that, although the word modifies "a means of identification," it does not modify "of another person." The Court stated: "if a bank official says, 'Smith knowingly transferred the funds to his brother's account,' we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's." Only in special contexts does this general interpretation not apply; and "[n]o special context is present here." The Court added that courts have usually read criminal statutes in precisely this manner, citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). And the Court rejected the Government's contention that its position would better serve the statute's objectives by giving potential offenders an incentive to avoid using IDs that belong to others. The Court found no basis to believe that "Congress intended to achieve this enhanced protection by permitting conviction of those who do not know the ID they unlawfully use refers to a real person." Lastly, the Court acknowledged that the Government may sometimes have difficulty proving knowledge on defendants' part, but found this does not "turn the tide in the Government's favor." In many cases — such as where a person gains a person's identification information by finding discarded credit cards — intent will not be hard to prove. And in the end, the Court was bound by Congress' express words.

Justice Scalia filed an opinion concurring in part and concurring in the judgment, which Justice Thomas joined. Justice Scalia agreed with the Court's plain-language reasoning, but criticized the Court for going further and relying on legislative history and stating that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Justice Alito filed a separate opinion concurring in part and concurring in the judgment. He cautioned against reading the Court's opinion "as adopting an overly rigid rule of statutory

construction." In his view, "it is difficult to say with the confidence the Court conveys that there is an 'ordinary' understanding of the usage of the phrase at issue in this case."

● *Abuelhawa v. United States, 08-192.* The Court unanimously held that a person who arranges to buy drugs over the telephone does not thereby transform the misdemeanor of buying drugs into the felony of using a "communication facility" to "facilitate" the felony of drug distribution. Salman Khade Abuelhawa had six phone conversations to arrange two purchases of a gram of cocaine from a drug dealer, whose cell phone was being tapped by the FBI. Under §843(b) of the Controlled Substances Act (CSA), it is a felony "to use any communication facility in committing or in causing or facilitating" certain felonies under the CSA. Abuelhawa's purchases were misdemeanors under §844, but the dealer's sales were felonies under §§841(a)(1) and (b). The Government charged Abuelhawa with six felony counts on the theory that each of the phone conversations constituted a violation of §843(b) because they facilitated the dealer's felonious sale of drugs to him. Abuelhawa moved for acquittal, arguing that his efforts to commit the misdemeanor of buying drugs did not, as a matter of law, constitute facilitation of felony drug dealing. The district court denied the motion and Abuelhawa was convicted on all six counts. The Fourth Circuit upheld his conviction, reasoning that the word "facilitate" should be given its common meaning — "to make easier" — and that Abuelhawa's use of the phone not only made the sales easier, it made them possible. In an opinion by Justice Souter, the Court reversed.

The Court rejected the Fourth Circuit's plain-meaning argument, noting that it "sits uncomfortably with common usage." When an event, like a sale, requires two participants, "it would be odd to speak of one party as facilitating the conduct of the other . . . . No buyer, no sale; the buyer's part is already implied by the term 'sale,' and the word 'facilitate' adds nothing." The Court noted too that its precedents supported the limitation of "facilitation" to persons other than the principals in the transaction, citing cases involving the illegal sale of alcohol and violation of the Mann Act. "The traditional law is that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature . . . ." For example, in *Gebardi v. United States*, 287 U.S. 112 (1932), the Court held that a woman's agreement to cross state lines to engage in "illicit sexual relations" did not facilitate the crime of transporting a woman across state lines for that purpose. Because Congress may be presumed to be aware of such precedents, the Court declined to hold that it intended a different result in the CSA, particularly because the Government's approach would undermine Congress's "calibration of respective buyer-seller penalties."

The Court noted that before 1970, both possession and sale of narcotics were felonies and the use of a "communication facility" in "committing, causing or facilitating" any drug offense added a minimum of two years, and up to five, to the applicable sentence. But in 1970, Congress amended the CSA, downgrading possession to a misdemeanor and limiting the prohibition on using a communication facility to facilitate a drug offense to

felonies. The Court reasoned that the Government's interpretation of §843(b) would mean that, in many cases, "Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense it had dropped to a misdemeanor with the right." Comparing Abuelhawa's possible 24-year sentence under the Government's interpretation with other significantly lower sentences provided for by the CSA, the Court concluded that the "Government's position is just too unlikely."

● *Boyle v. United States, 07-1309.* In a 7-2 decision, the Court held that while an association-in-fact enterprise under RICO must have "an ascertainable structure," the enterprise's existence and structure may be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity. Petitioner Edmund Boyle was part of a "loosely and informally organized" group of bank robbers that apparently had no leader, hierarchy, or long-term plan. The group typically met before each theft to plan the crime, gather tools, and assign each other roles (such as lookout and driver). Afterward, the group would split the proceeds from the thefts. The Government charged Boyle with several completed and attempted bank burglaries and with racketeering and racketeering conspiracy charges under RICO. In general, RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). As relevant here, RICO defines an "enterprise" to include "any union or group of individuals associated in fact although not a legal entity." At trial, and over Boyle's objection, the judge instructed the jury that it could find the existence of an enterprise without proof that the group had "any particular or formal structure" so long as its members had "sufficient organization to function and operate in a coordinated manner." The jury convicted Boyle on 11 of the 12 counts, including the RICO counts. The Second Circuit summarily affirmed. In an opinion by Justice Alito, the Court affirmed.

The Court stated that, although the "statute does not specifically define the outer bound-aries of the 'enterprise' concept," it "is obviously broad, encompassing 'any . . . group of individuals associated in fact.'" The Court In United States v. Turkette, 452 U.S. 576, 583 (1981), therefore explained that an "enterprise" reaches "a group of persons associated together for a common purpose of engaging in a course of conduct." The Court then turned to the specific questions whether a RICO association-in-fact enterprise must (1) have a "structure"; (2) that is "ascertain-able"; and (3) that goes "beyond that inherent in the pattern of racketeering"? The Court agreed with Boyle that an enterprise must have a "structure" that contains three core features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." The Court also agreed that the purpose must be ascertainable, but found no reason to instruct the jury on that because any time a jury finds an element, the element is "ascertainable." Finally, and most importantly, the Court rejected Boyle's contention "that the existence of an enterprise may never be inferred from evidence showing that persons associated with the enterprise engaged in a pattern of racketeering

activity." Boyle had argued that an "enterprise" must have "structural attributes, such as a structural 'hierarchy,' 'role differentiation,' a 'unique modus operandi,' a 'chain of command,'" and so on. The Court disagreed, reaffirming that "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have" any of the specific attributes put forth by Boyle. Nor, held the Court, would its reading of the statute lead to a merger of the RICO crime proscribed by §1962(c) and other federal offenses such as operating a gambling business. The Court concluded the trial judge in this case correctly and adequately instructed the jury.

Justice Stevens filed a dissenting opinion, joined by Justice Breyer, which argued that the majority too broadly construed "enterprise." An enterprise, the dissent urged, "must have business-like characteristics" and a separate existence. "If an entity's existence consisted solely of its members' performance of a pattern of racketeering acts, the 'enterprise's affairs' would be synonymous with the 'pattern of racketeering activity.'" It follows, the dissent reasoned, that the majority, in permitting the Government to prove both elements with the same evidence, has rendered RICO's enterprise requirement essentially meaningless in association-in-fact cases. Nothing in RICO's text or history shows that Congress intended it to reach "such ad hoc associations of thieves."

● *Pleasant Grove City v. Summum, 97-665.* The Court unanimously held that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to strict scrutiny under the Free Speech Clause." The Court therefore reversed a Tenth Circuit decision which held that Pleasant Grove City violated the free speech rights of the Summum church when it declined to permanently display a monument donated by the church. The park at issue contains 11 monuments donated by private groups and individuals, including a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971. The Summum church wished to erect a stone monument containing its "Seven Aphorisms," but its request was denied by Pleasant Grove because the monument would not directly relate to the city's history and was not donated by a group "with longstanding ties to the Pleasant Grove community." The city also cited safety and aesthetics as reasons to limit placement of monuments in the historic park. The district court denied the church's request for a preliminary injunction based on the Free Speech Clause, but the Tenth Circuit reversed. The court of appeals reasoned that public parks are traditional public forums and that, therefore, the city could not deny the church's request for a monument, while allowing others, unless there was a compelling justification for doing so that could not be served by more narrowly tailored means. In an opinion by Justice Alito, the Court reversed.

The Court began by stating that "[n]o prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park," and therefore the Court had to decide whether to analyze the issue as a "government speech" case, or whether the case was more properly viewed as a "public forum" case. The Court concluded that the city was engaging in its own expressive conduct, and therefore the Free Speech Clause

had no application to its decision to reject Summum's monument. A government entity has the right to "speak for itself" and select which views it wants to express, and it can enlist a private entity to express its own views. On the other hand, the Court stressed that citizens have a right to speak on traditional public property, subject to reasonable time, place, and manner restrictions. By contrast, "[p]ermanent monuments displayed on public property typically represent public speech" because governments "have long used monuments to speak to the public." Just as government funded and erected monuments would be considered government speech, privately financed and donated monuments are also government speech when accepted and displayed by the government on its land. The Court pointed out that throughout history, "the general government practice with respect to donated monuments has been one of selective receptivity." As such, governments "select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as aesthetics, history, and local culture." Monuments accepted by governments therefore constitute government speech.

In this case, the monuments in the city park constituted government speech because Pleasant Grove exercised final approval authority over all monuments placed in the park, rather than opening up the park for whatever permanent monuments might be offered. The city selected the monuments it wished to display subject to criteria set forth by its city council. The Court rejected Summum's argument that the city would have to formally adopt the message conveyed by each monument in the park. A government engages in speech when it accepts a monument, even if the specific meaning or message may differ among the government, monument donors, or members of the public. Moreover, stressed the Court, the traditional free speech rights of citizens have never been abridged in the park. The Court therefore refused to require that governments either reject or remove monuments, or face clutter and other problems by accepting all donated monuments. Because the "forum analysis" was out of place and the Free Speech Clause therefore did not apply, the Court reversed the Tenth Circuit.

In a concurring opinion, Justice Stevens, joined by Justice Ginsburg, stated that while he agreed with the majority, the city could also have refused the church's monument if acceptance of the monument could be deemed an "endorsement of the donor's message" in violation of the Establishment Clause. Justice Scalia, joined by Justice Thomas, also concurred, stating agreement with the majority's free speech analysis, but also concluding that the Ten Commandments display would not thereby violate the Establishment Clause because the monument was part of the park's overall display of permanent monuments. In his concurrence, Justice Breyer added that the government could not discriminate in its selection of permanent monuments and then escape under the "government speech" doctrine. Finally, Justice Souter filed an opinion concurring in the judgment. He expressed "qualms . . . about accepting the position that public monuments are government speech categorically." He noted that the government speech doctrine is "recently minted" and that "[t]he interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . begun to be worked out." Justice Souter proposed an "observer test" to determine if a monument constitutes government expression, *i.e.*, "whether a reasonable and fully informed observer would understand the

expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."

● *Pearson v. Callahan, 07-751.* The Court unanimously overruled *Saucier v. Katz*, 533 U.S. 194 (2001), which held that in actions brought under 42 U.S.C. §1983 courts must resolve the merits of constitutional claims first, even where it is obvious that the defendants would prevail because the alleged constitutional rights were not "clearly established." The Court went on to hold that petitioners were entitled to qualified immunity because at the time they searched respondent's house it was not clearly established that their conduct violated the Fourth Amendment. Petitioners are members of the Central Utah Narcotics Task Force. In 2002, one of their informants informed them that respondent Afton Callahan had arranged to sell him methamphetamine later that day. That evening, the Task Force gave the informant $100 and a concealed electronic transmitter to monitor his conversations, and agreed upon a signal he would give upon completing the transaction. The officers drove the informant to Callahan's trailer, where he was let in. Callahan retrieved a large bag contained methamphetamine from his freezer and sold a gram to the informant, who gave the arrest signal to the officers. The officers entered the trailer through a porch door, encountered Callahan and two others in the enclosed porch, conducted a protective sweep of the premises, and recovered drugs and drug paraphernalia. Callahan was charged with unlawful possession and distribution of methamphetamine. Callahan was convicted, but the Utah Court of Appeals reversed the conviction on the ground that the warrantless arrest and search violated the Fourth Amendment. Callahan then turned around and sued petitioners under §1983 in federal district court. The district court granted petitioners' summary judgment motion on the ground "that other courts had adopted the 'consent-once-removed' doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view." The Tenth Circuit reversed. The court first rejected the "consent-once-removed" doctrine as applied to the actions of informants (as opposed to undercover officers). The court next held that petitioners were not entitled to qualified immunity because the law clearly established that warrantless entries into the home are unreasonable absent consent or exigent circumstances, neither of which existed here. In an opinion by Chief Justice Roberts, the Court reversed. . . . . .

The Court began by addressing *Saucier's* "inflexible requirement" that courts must resolve qualified immunity claims by first deciding whether the plaintiff has alleged or made out a violation of a constitutional right, and only then deciding (if the plaintiff has satisfied that first step) whether that right was clearly established at the time of the alleged misconduct. The Court adopted the *Saucier* rule "to support the Constitution's elaboration from case to case and to prevent constitutional stagnation" (internal quotation marks omitted). The Court found it appropriate to reconsider *Saucier*, notwithstanding the doctrine of *stare decisis*, because the rule involves procedure, not primary conduct, and because the "rule is judge made and implicates an important matter involving internal Judicial Branch operations." The Court stated that "we now have a considerable body of

experience to consider regarding the consequences of requiring adherence to this inflexible procedure." And taking into account that experience, the Court concluded that, while application of the *Saucier* approach will continue to be appropriate in many cases, it is no longer mandatory. "[J]udges of the district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

The Court found that the *Saucier* procedure often "results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case" because "it is plain that a constitutional right is not clearly established." Requiring litigation of the constitutional issue forces judges to conduct "what may seem to be an essentially academic exercise," and "wastes the parties' resources," which disserves the purpose of qualified immunity. The Court pointed to other flaws with the *Saucier* procedure. First, development of constitutional precedent is little served when cases are very fact-bound or they require interpretation of ambiguous state law. Second, "the precise factual basis for the plaintiff's claim may be hard to identify" at the pleading stage. *Saucier* requires courts to resolve constitutional issues based "on a kaleidoscope of facts not yet fully developed." Third, the procedure risks faulty constitutional decisionmaking when judges, in their own minds, reach the "clearly established" question at the outset, and then devote less care to the constitutional issue itself. Fourth, the rigid rule can thwart appellate review of constitutional questions, as prevailing parties on the second *Saucier* prong may not be able to obtain review of more difficult constitutional questions for future cases. Lastly, the mandatory *Saucier* approach "departs from the general rule of constitutional avoidance." The Court therefore overruled *Saucier* to the extent it mandates the order of decisionmaking. The Court then exercised its newly granted flexibility by skipping the first step that *Saucier* had mandated and jumping straight to whether petitioners had violated clearly established law. The Court held they had not, noting that some circuits have applied the "consent-once-removed" doctrine to warrantless entries after consent was given to confidential informants.

● *Van de Kamp v. Goldstein, 07-854.* In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that individual prosecutors are absolutely immune from §1983 liability based on their decisions to present false testimony or suppress evidence at trial. In this case, the Court unanimously held that this absolute immunity extends to claims against an elected District Attorney and his chief deputy "due to: (1) a failure to properly train prosecutors, (2) a failure to properly supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment information about informants." Respondent Thomas Goldstein filed a federal habeas action in 1998, claiming that his 1980 murder conviction hinged on the false testimony of a jailhouse informant that was given in exchange for favorable treatment. Goldstein alleged that the prosecutors knew about this critical impeachment information but failed to provide his attorney with it, leading to an erroneous conviction. The district court and Ninth Circuit agreed and ordered Goldstein's release. Upon his release, Goldstein filed a §1983 action against petitioners, the former

Los Angeles County District Attorney and Chief Deputy District Attorney. He alleged that the prosecution violated its constitutional duty to "insure communication of all relevant information on each case to every lawyer who deals with it." See *Giglio v. United States*, 405 U.S. 150 (1972). Goldstein further alleged that this failure resulted from petitioners' failure to properly train and supervise prosecutors and to establish an information system about informants. Petitioners moved to dismiss based on absolute immunity, but the district court denied and motion and the Ninth Circuit affirmed. The Ninth Circuit ruled that the allegations amounted to conduct that was "administrative," as opposed to "prosecutorial," and that absolute immunity therefore did not apply. In an opinion by Justice Breyer, the Court reversed.

The Court explained that prosecutors are given absolute immunity for §1983 actions to prevent "harassment by unfounded litigation" that could deflect a prosecutor's attention and damage his "independence of judgment required by his public trust." The Court has made clear, however, that prosecutorial immunity may not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in investigative or administrative tasks. The Court uses a "functional" approach to decide whether certain acts qualify for immunity. The Court agreed that Goldstein's claims attacked the office's administrative procedures, but concluded they are the sort of claims to which absolute immunity nonetheless obtains. The Court explained that Goldstein's claims "focus upon a certain kind of administrative obligation — a kind that itself is directly connected with the conduct of a trial." The types of activities at issue here require legal knowledge and discretion; "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim[s]." They are therefore "unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like," as to which there is no absolute immunity. The Court observed that "[d]ecisions about indictment or trial prosecution will often involve more than one prosecutor within an office," including supervisors, and that the management decisions challenged here cannot readily be distinguished from specific supervision related to a particular case. In the end, allowing Goldstein's claims to go forward would allow potential damage claims to "affect the way in which prosecutors carried out their based court-related tasks" — precisely what *Imbler* sought to prevent. Finally, the Court noted that adopting Goldstein's position would have created the anomaly that individual prosecutors would be immune for even intentional wrongful conduct, while their supervisors would be potentially liable for negligent conduct.

● *Caperton v. A.T. Massey Coal Co., 08-22.* By a 5-4 vote, the Court held that a West Virginia Supreme Court Justice was required under the Due Process Clause to recuse himself from a case involving a $50 million judgment against a company whose CEO had spent $3 million in support of his election. In 2002, a jury found A.T. Massey Coal Company (Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations in the amount of $50 million in a suit brought by Hugh Caperton and related coal companies (Caperton). In June 2004, the trial court denied Massey's post-trial motions. Later in 2004, there was an election for a seat on the

West Virginia Supreme Court, which would hear any appeal in the case. In that election, Brent Benjamin was running against sitting Justice McGraw. Don Blankenship, Massey's CEO, not only contributed the statutory maximum of $1000 to Benjamin's campaign committee, but he donated nearly $2.5 million to §527 organization that supported Benjamin and spent a little more than $500,000 in independent expenditures, including television and newspaper advertisements, in support of Benjamin's election. Blankenship's spending was greater than that of all Benjamin's other supporters and more than three times what Benjamin's own campaign committee spent. Benjamin won the election with 53.3% of the vote. In October 2005, before Massey filed its appeal, Caperton moved to disqualify Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct. Justice Benjamin denied the motion, stating that he has no "bias for or against any litigant" and that there is no reason to believe he "will be anything but fair and impartial." The West Virginia Supreme Court eventually reversed the $50 million verdict in a 3-2 vote, with Justice Benjamin in the majority. On rehearing, following the recusal of two other Justices, the court again reversed the jury verdict by a 3-2 vote, with Justice Benjamin again in the majority. After the petition for certiorari was filed, Justice Benjamin filed a concurring opinion explaining his decision not to recuse himself, which noted that he had no direct pecuniary interest in the outcome of the case and which rejected a "standard merely of 'appearances.'" In an opinion by Justice Kennedy, the Court reversed.

The Court began by considering two lines of precedent identifying the sources of potential judicial bias that create a due process violation — when a judge has a financial interest in the outcome of a case and when a judge presides over criminal contempt proceedings arising from an earlier proceeding over which he also presided. In both lines of cases, the Court noted, it had recognized both the intensely fact-specific nature of the inquiry and the importance of establishing objective standards. "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" The Court noted Justice Benjamin's careful analysis of the question whether he had any actual bias, but reasoned that the "difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules." "In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"

Applying this standard to the facts before it, the Court noted that this "is an exceptional case" and concluded that "there is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Spelling the test out further, the Court stated that "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election. . . . The temporal relationship

between the campaign contributions, the justice's election, and the pendency of the case is also critical." The Court concluded that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level." The Court acknowledged "that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong." "But," found the Court, "it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards." The Court expressed doubt either that its holding would produce a "flood of recusal motions" or that courts would find it particularly difficult to apply the holding to less extreme circumstances. The Court also noted the important role that state codes of judicial conduct play in managing issues of judicial bias.

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. The dissent argued that the majority's "probability of bias" standard "cannot be defined in any limited way" and predicted that it would lead to an increase in claims of judicial bias that would do far more damage to "public confidence in judicial impartiality than an isolated refusal to recuse in a particular case." The dissent complained that the Court's opinion failed to provide "workable guidance for future cases," and identified some 40 questions that courts might face as they grappled with applying the "probability of bias" standard. (For example, "[h]ow much money is too much money?" "Does the amount at issue in the case matter?" "Does the probability of bias diminish as the election recedes?" If the expenditure is made by a trade association, "[m]ust the judge recuse in all cases that affect the association's interests?" "What if the case involves a social or ideological issue rather than a financial one?" "What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision?" "Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?" "Should we assume that elected judges feel a 'debt of hostility' toward major opponents of their candidacies?") The dissent predicted that the Court's holding would suffer the fate of United States v. Halper, 490 U.S. 435 (1989), which extended double jeopardy protection to some civil penalty cases and was abandoned a mere eight years later, in Hudson v. United States, 522 U.S. 93 (1997), as "ill-considered" and "unworkable." Justice Scalia filed a separate dissent, to make the point that not all ills are best solved by resort to the Constitution.